SUPREME COURT, U.S.
FILED
JUL 22 1998
OFFICE OF THE CLERK

NO. 98 187

In the Supreme Court of the United States

OCTOBER TERM, 1998

MORRIS PELTIER, JR.
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

CHARLES R. SONNIER #12260
FRANK W. SUMMERS II #14755
SONNIER & TRAHAN
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR MORRIS PELTIER, JR.

MARK R. TAMMARIELLO #21083
104 Windrush Lane
Lafayette, Louisiana 70506
(318) 261-2118
ATTORNEYS FOR MORRIS PELTIER, JR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

40 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the statute under which Petitioner has been indicted (La. R.S. 30:2183 G. (1)) provided him with adequate prior notice that it was a crime to *store* hazardous waste, where the language of the statute does not prohibit "store" and where the Bankruptcy Court oversaw and acquiesced in the "storage" of wastes for which Petitioner is now being prosecuted - *viz.*, **Whether the criminal statute is unconstitutionally void-for-vagueness?**

PARTIES TO PROCEEDINGS BELOW

Petitioner, Morris Peltier, Jr., is the only party defendant in the lower court proceedings who is filing this Writ Application. The State Attorney General is expected to appear in this matter. The Louisiana Department of Environmental Quality filed an amicus curiae brief in the Louisiana Supreme Court, and the U. S. Attorney's Office acted as "lead counsel" representing the State in proceedings before the Louisiana Supreme Court. A copy of this writ application is being served by mail upon each of these state and federal government attorneys.

There are no parent or subsidiary companies to be listed pursuant to Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

PARTIES TO PROCEEDINGS BELOW.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

REPORTS OF OPINIONS DELIVERED BY LOWER COURTS.....1

(a) Decision by the Trial Judge.....1
(b) Decision by Louisiana Supreme Court.....3
(c) Dissenting Opinion by Justice Knoll.....6
(d) Comments.....7

STATEMENT OF JURISDICTION.....8

STATUTE INVOLVED.....8

STATEMENT OF THE CASE.....9

(a) LOWER COURT PROCEDURES.....9
(b) FACTUAL BACKGROUND.....10

ARGUMENT.....13

(a) SOMETHING NEEDS TO BE DONE.....13
(b) CONSTITUTIONAL DUE PROCESS—VOID-FOR-VAGUENESS DOCTRINE.....16
(i) Vague laws ensnare the innocent.....17
(ii) Due Process prohibits vague laws.....17
(iii) Guidelines for judicial review.....17
(iv) Strict construction of criminal statutes.....18

TABLE OF CONTENTS (continued)

(v) No judicial re-writing of criminal statutes.....19
(vi) Lofty ideals are no excuse for vague criminal laws.....21
(vii) Legislature cannot turn over its responsibility to other branches of government.....21

(c) STATUTE VAGUE ON ITS FACE AND IN APPLICATION.....22

CONCLUSION.....28

TABLE OF AUTHORITIES

CASES **Page**

Albernaz vs. U.S., 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981).....14

Arnett vs. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974).....14

Baggett vs. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964).....17

Chapman vs. United States, 500 U.S. 453, 111 S.Ct. 919, 114 L.Ed. 2d 524 (1991).....21

Connally vs. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).....17

Davis vs. Williams, 617 F.2d 1100 (5th Cir. 1980).....14

Dunn vs. United States, 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed. 2d 743 (1979).....19

Finely vs. National Endowmwnt for the Arts, 100 F.3d 671 (9th Cir. 1996).....20

Grayned vs. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972).....17,18

Kolender vs. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed. 2d 903 (1983).....18,20

Lanzetta vs. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 2d 888 (1939).....18,27

TABLE OF AUTHORITIES (continued)

CASES **Page**

Parker vs. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974).....14

Pierce vs. United States, 314 U.S. 306, 62 S.Ct. 237, 86 L.Ed. 226 (1941).....20

Roberts vs. U.S. Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed. 2d 462 (1984).....21

State vs. Braun, 378 A.2d 640 (Del 1977).....15

Smith vs. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed. 2d 605 (1974).....18

Southern Illinois Asphalt Co., Inc., vs. Environmental Protection Agency, 15 Ill. App. 3d 66, 303 NE 2d 606, (Ill 1973).....15

State vs. Davis, 448 So.2d 645 (La. 1984).....5

State vs. Dousay, 378 So.2d 414 (La. 1979).....2,27

State vs. Union Tank Car Company, 439 So. 2d 377, (La. 1983).....2,15,19,24

U.S. ex rel Newsome vs. Malcolm, 492 F.2d 1166, (2nd Cir. 1974).....26

U.S. vs. Kozminski, 487 U.S. 931, 108 .Ct. 2751, 101 L.Ed. 2d 788 (1988).....20

TABLE OF AUTHORITIES (continued)

CASES **Page**

U.S. vs. Wiltberger, 18 U.S. 76, 5 L.Ed. 37 (1820).....19

United States vs. Mersky, 361 U.S. 431, 80 S.Ct. 459, 5 L.Ed. 2d 423 (1960).....19

United States vs. Reese, 92 U.S. 214, 23 L.Ed. 563 (1876).....20

STATUTES

28 U.S.C. §1257(a).....8

42 U.S.C. §§6901-6979(b).....25

L.C.Cr.P. Art. 464.....1

La. R.S. 14:3.....24

La. R.S. 30:2180.....6

La. R.S. 30:2183 G.(1).....i,1-10,12,19,22-25

La. R.S. 30:2183 G.(2).....1,7,9,22

La. R.S. 30:2202(A).....3

La. R.S. 30:2202(B).....1,23

ADMINISTRATIVE REGULATIONS

40 CFR 271.16(a)(3)(ii).....25

ADMINISTRATIVE REGULATIONS (continued)

Page

LAC 33:105(F).....1

LAC 33:V.303B.....1

LAC 33:V.305.....6

TREATISES

16—A Am.Jur. 2d - *Constitutional Law,* §173, p.53.....21

16—A Am.Jur. 2d - *Constitutional Law,* §174, p.54.....20

16-A Am.Jur. 2d - *Constitutional Law,* §186, p.86.....21

21 Am.Jur 2d - *Criminal Law,* §17, p.129.....27

73 Am.Jur. 2d - *Statutes,* §211, p.405.....24

73 Am.Jur. 2d - *Statutes,* §293, pp. 451-452.....19

73 Am.Jur. 2d - *Statutes,* §295, p.453.....19

Antieau and Rich, *Modern Constitutional Law* (West 2ed 1997), §3.01, p.21.....16

Joseph G. Cook, *Constitutional Rights of the Accused,* (3ed. 1996), Vol. 1, §1.6, pp. 1-17 through 1-18.....17

Paul H. Robinson, *Criminal Law Defenses* (West, 1984), Vol. 1, §35, p. 149.....17

"Rule of Lenity", 62 L.Ed. 2d 827.....19

TREATISES (continued)

Page

Smith and Reed, *Civil Rico* (Matthew-Bender) §908, p.9-71.....18,20

G. Williams, *Criminal Law: The General Part* (2ed 1961), p. 575.....16

MICELLANEOUS

Supreme Court Rule 10.1(c).....8

Supreme Court Rule 29.6.....ii

REPORTS OF OPINIONS DELIVERED BY LOWER COURTS

(a) *Decision of the Trial Judge*

There was a hearing in open court on the Defendants' Motion to Quash. Evidence was taken, and Judge Aaron rendered his decision from the bench. The Defendants fell into two categories: those, who like Petitioner Peltier, were charged with storage of hazardous waste under La. R.S. 30:2183 G.(1), and others charged with storage of hazardous waste under La. R.S. 30:2183 G.(2). The court denied the motion to quash criminal charges under 2183 G.(2), but did quash the indictments for "storage" of hazardous wastes under 2183 G.(1):

> ...[T]he State acknowledges that "storage" is not a specifically proscribed act under G-1. The State argues that the Defendants are really charged withh violating the section of 2183 (G)(1) which prohibits any person from knowingly violating any provision of Chapter 30, the Louisiana Hazardous Waste Control Law which is referred to as 'LHWCL'.
>
> In La. R.S. 30:2202(B), the LHWCL prohibits the violations of the regulations promulgated by the Louisiana Department of Environmental Quality. The Louisiana DEQ regulations are promulgated in the Louisiana Administrative Code referred to as "LAC".
>
> Under LAC 33:105(F) and 33:V.303B, it is impermissible to store hazardous waste without a permit or interim status permit. Therefore, the State contends it can validly charge these three Defendants with violating La. R.S. G-1 for storage of hazardous waste without a permit or interim status permit.
>
> Under [the Louisiana Code of Criminal Procedure] Art. 464, an indictment must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. **Decision of the Trial Judge, Appendix C, p. A-25.**

The judge cites *State v. Union Tank Car Company,* 439 So.2d 373 (La. 1983), for the proposition that the Due Process clauses of the United States and Louisiana Constitutions require that criminal statutes must give adequate prior notice to an individual that certain contemplated conduct is proscribed and punishable by law, and must provide adequate standards to be applied by police, administrators, and the courts in determining the guilt or innocense of an accused. Furthemore, penal statutes must be strictly construed and cannot be extended to cases not included within the clear import of their language—nothing is a crime which is not clearly and unmistakably made a crime.

The court also cites *State v. Dousay,* 378 So.2d 414 (La. 1979), for the proposition that persons cannot be left to guess at the meaning of criminal statutes and regulations. Id., pp. 50-51.

Then the court applies these standards to the indictments against Defendants:

> The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense.
>
> For these reasons, the Court hereby grants the Motions to Quash by Defendants Nicolosi, Byrd and Peltier. **Decision of the Trial Judge, Appendix C, p. A-27.**

Petitioner believes the decision of the trial judge was imminently correct; the indictment under La. R.S. 30:2183 G.(1) must be quashed, because the statute does not, on its face, prohibit "storage" of a hazardous waste, and the "catch-all" inclusion of large bodies of administrative regulations is overbroad and fails to satisfy constitutional Due Process standards.

(b) Decision by Louisiana Supreme Court (State v. Byrd, 708 So.2d 401 (La. 1998))

Under Louisiana law, the trial judge's decision quashing the indictments was appealable to the Louisiana Supreme Court, and that court found that "although language contained within the 'catch-all' provision of La. R.S. 30:2183 G.(1) is somewhat expansive because it refers the reader to the entire Chapter on Hazardous Waste Control, we find that the trial court erred in holding the statute unconstitutional." Decision of Justice Johnson, Louisiana Supreme Court, Appendix D, p. A-31.

The Louisiana Supreme Court also found that although the effect of the indictment was to charge Defendants with violation of administrative regulations prohibiting "storage" of hazardous waste (where the legislative statute did not), such a criminalization of conduct by an administrative agency did not constitute an improper delegation of legislative authority.

The court went on to address the question of whether or not La. R.S. 30:2183 G.(1) was unconstitutionally vague or overbroad:

> The Defendants were charged under the "catch-all" section of the statute, i.e., "any person who otherwise knowingly violates any provision of this Chapter." The state expounded upon this in its supplemental response to defendants motion for a bill of particulars citing various waste regulations. La. R.S. 30:2202(A) provides that "[n]o person shall initiate or continue the generation, transportation, treatment, storage, or disposal of hazardous waste except as in compliance with the provisions of this Subtitle." Subsection (B) goes on to provide that "[n]o person shall violate any rule or regulation adopted by the secretary under this Subtitle."
>
> In the instant case, Defendants contend that the statute is vague as applied because the state's attempt to utilize the entire body of hazardous waste regulations as a basis to substantiate the charge fails to give adequate notice and provide adequate standards. Indeed,

the trial court's use of the word "overbraod" appears to be in reference to this very point. **Id., pp. A-39 — A-40.**

In footnote 11 at page A-40, Justice Johnson deals with the "catch-all" provision "that criminalizes violation of any statute contained in the HWCL." And she points out that other statutes in that body of law do prohibit illegal "storage" of hazardous waste: "Consequently, via the 'catch-all' provision of subsection G(1), the state properly charged that defendants illegally stored hazardous waste." Id., p. A-40, fn.11. The Justice also points out that the state in its bill particulars and supplemental bill of particulars did eventually cite specific administrative regulations prohibiting "storage" without interim permits.

Justice Johnson moves away from the question of whether La. R.S. 30:2183 G.(1) is itself overly broad and vague, and relies heavily on a supplemental bill of particulars which narrows the *factual* description of the crime. But Defendants were not complaining about the description of facts which the State alleges were criminal. Petitioner complains that the *statute itself* does not make those facts a crime! The State has alleged that Petitioner stored hazardous waste without a permit, in certain containers, at the Marco of Iota facility. But statute under which he is charged does not make "storage" of hazardous wastes a crime.

In effect, the court avoids the question of "adequate prior notice", and the question of whether or not "catch-all" references to broad administrative regulations are sufficient to describe criminal conduct. Instead, the court looks to the accumulated understanding between the parties up to the time of the hearing on the Motion to Quash, and concludes that Defendants were well aware of the facts which the prosecution was alleging were criminal.

As to the question of whether "catch-all" references are too broad and vague to satisfy Due Process requirements, the court says:

> In the instant case, under the terms of the statute, the conduct proscribed is unambiguous, i.e., "any

person who otherwise knowingly violated any provision of this Chapter ...." An "ordinary person" of "reasonable intelligence" is capable of understanding that to comply with La. R.S. 30:2183 G(1), one must not violate any provision of the HWCL, a self-contained body of statutes dealing with hazardous waste. No person in the hazardous waste industry is called upon to determine when, how or where to store, dispose or emit their hazardous waste. Rather, these activities are well regulated by the HWCL and the regulations implementing those statutes. **Id., p. A-45.**

In addition, by virtue of an indictment or bill of particulars, the exact conduct would be alleged and a defendant could easily find the corresponding statute in the HWCL. Furthemore, as noted earlier with respect to notice, defendants operating in a dangerous industry are charged with knowledge of the regulations of that industry. **Id., p. A-45.**

The court urges that there is really no "vagueness" here: "In the instant case, there are no vague terms; rather, the trial court objected to the construction of the statute in that the statute does not specifically state the various ways in which it may be violated but incorporates other statutes contained withinn the HWCL as well as the body of accompanying hazardous waste regulations to define criminal conduct." Id., p. A-46.

To justify this broad incorporation of "other statutes" and "the body of accomplying hazardous waste regulations", the court relies on a Louisiana case where a game statute making it a crime to shoot "illegal deer" referred to Department of Wildlife and Fisheries regulations defining exactly what an "illegal deer" was — the administrative definition of "illegal deer" would change from time to time. In *State v. Davis,* 448 So.2d 645 (La. 1984), the court found that the statutory reference to game regulations defining "illegal deer" did not constitute an overly broad or vague definition of criminal conduct: "While the statute itself does not define

illegal deer specifically, the statute clearly directs the reader to consult regulations of the Wildlife and Fisheries Commission, and those regulations are clear and unambiguous." *Davis,* 448 So.2d at 649.

Where Justice Johnson's analysis fails, in comparing the case at bar to the "illegal deer" case, is that the statute which referred to the game regulations clearly proscribed the taking of "illegal deer". But in the case at bar, 2183 G.(1) clearly *does not* proscribe the "storage" of hazardous wastes, although other statutes and other administrative regulations may.

The Louisiana Supreme Court reversed the trial court's ruling and held that La. R.S. 30:2183 G.(1) was "constitutional as applied by the State in the indictment against the Defendants". Id., p. A-53. Petitioner's application for a rehearing was denied on April 24, 1998.

(c) ***Dissenting Opinion by Justice Knoll***

Justice Knoll wrote a strong dissent; she says "the trial court correctly found the statute unconstitutionally vague." Dissenting Opinion of Justice Knoll, Appendix D, p. A-54.

La. R.S. 30:2183 G.(1) does not prohibit the "storing" of hazardous waste:

> On its face La. R.S. 30:2183 G(1) shows that the Defendants were indicted on the charge of *storing* hazardous waste, a crime not prohibited in the statute charge. Notwithstanding, the majority finds that the Defendants were charged with a constitutionally sanctioned crime because they were in violation of the "catch-all" section of La. R.S. 30:2183 G(1) as persons who "knowingly violate[d] any provision of this Chapter ...." With this as a starting point, the majority takes a quantum leap and finds that under La. R.S. 30:2180 et seq, the Louisiana Department of Environmental Quality is authorized to promulgate rules and regulations for the management of hazardous wastes. Then, taking it a step further finds that under 33:V.305 permits are required

> for the treatment, storage, and disposal of hazardous waste and that storage of hazardous waste without a permit is proscribed criminal conduct. **Id., pp. A-55 – A-56.**

Justice Knoll urged that penal statutes must be strictly construed and cannot be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime. Penal statutes are vague if they do not notify persons in advance that particular conduct is proscribed and legally punishable. Id., p. A-56. Applying the well established jurisprudence, she concludes:

> ...I find that the trial court was eminently correct in finding La. R.S. 30:2183 G(1) unconstitutionally vague. As pointed out herein, La. R.S. 30:2183 G(1) does not proscribe the *storage* of hazardous waste. By utilizing an attenuated reference to a myraid of regulations to prop up the statute in question, the majority has expanded La. R.S. 30:2183 G(1) beyond the provisions of the legislative enactment and has created a crime which does not exist. For these reasons, I respectfully dissent and would affirm the trial court's determination that La. R.S. 30:2183 G(1) is unconstitutionally vague. **Id., p. A-56.**

In a footnote, Justice Knoll points out that subsection G.(2) clearly makes "storage" of hazardous waste criminal, when there is a threat of bodily harm. A proscription against "storage" could as ealily have been included in 2183 G.(1), if the Legislature had so intended.

(d) Comments

If G.(1) is read in "context" along with G.(2), then a reasonable man of ordinary intelligence would conclude that he could violate G.(2) by "storage" without a permit, but that "storage" would not constitute a violation under G.(1). Certainly, for the sake of clarity, it would have been a simple matter for the Louisiana Legislature to include "storage" in the list of proscriptions under G.(1), if indeed that was

intent. Precise definition was possible and could easily have been achieved by the Legislature, if it meant to proscribe "storage"; there was no need to resort to a sweeping "catch-all" reference.

G.(1)'s sweeping (overbroad and vague) criminalization of all acts of "any person who otherwise knowingly violates any provision of this Chapter", carries a penalty of $100,000.00 per day and /or ten (10) years imprisonment at hard labor. The result is that horrendous penalties could be imposed for minor infractions of any of an extensive array of administrative DEQ and EPA regulations.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review the Judgment of the Louisiana Supreme Court entered March 13, 1998, and that court's order denying Petitioner's Application for Rehearing, issued April 24, 1998. This Court has jurisdiction under authority of 28 U.S.C. §1257(a), which gives Certiorari Jurisdiction to review "final judgments or decrees rendered by the highest court of the State in which a decision could be had,...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution...or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution...or statutes of...the United States."

Additionally, Supreme Court Rule 10.1(c) provides for consideration of Petitions for Writs of Certiorari when "a state court...has decided an important federal question in a way that conflicts with decisions of this Court."

STATUTE INVOLVED

The Louisiana statute questioned in this writ application is Louisiana Revised Statute 30:2183 G.(1), which reads as follows:

> G. (1) Any person who willfully or knowingly discharges, emits, or disposes of any substance in contravention of

> any provision of this Chapter or any regulations or of any permit or license terms and conditions adopted in pursuance thereof, or any person who otherwise knowingly violates any provision of this Chapter, shall upon conviction be subject to a fine of not more than one hundred thousand dollars per day of violation and costs of presecution, or imprisonment at hard labor for not more than ten years, or both.

Petitioner will argue that language of the above statute cannot support a charge for "storage" of hazardous wastes, and is unconstitutionally vague on its face and in its application under the circumstances of this case. Petitioner will compare the language of the above quoted subparagraph G.(1) with language of subparagraph G.(2), which reads as follows:

> (2) Any person who knowingly transports, treats, stores, disposes of, or exports any substance in contravention of any provisions of this Chapter or the regulations or of any permit or license terms and conditions adopted in pursuance thereof, or any person who otherwise knowingly violates any provisions of this Chapter, in such manner that he knows, or should have known, at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than two hundred fifty thousand dollars per day of violation and costs of prosecution, or imprisonment at hard labor for not more than fifteen years, or both.

Petitioner alleges the Louisiana statute violates Due Process guarantees of the Fourteenth Amendment to the United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

(a) *LOWER COURT PROCEDURES*

On August 5, 1994, Petitioner was indicted in Acadia

Parish, Louisiana. The indictment (and bill of particulars) states that from on or about September 1, 1990 through on or about February 28, 1991, Petitioner and other defendants "knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisianna Highway 370 in Acadia Parish, without a permit or interim status for such storage, in violation of the provisions of La. R.S. 30:2183 G.(1)." (See, Indictment, Appendix A; Bill of Particulars, Appendix J.)

Petitioner filed a "Motion to Quash" asserting that La. R.S. 30:2183 G.(1) was indefinite and vague, and therefore should be struck down under the Due Process clause of the United States Constitution. (See, Motion to Quash, Appendix B.)

The trial judge rules in favor of Petitioner, and the indictment was quashed. The judge's reasons are transcribed. (See, Opinion of Trial Court, Appendix C.) The State Attorney General, along with the U.S. Attorney's Office, and the Louisiana Department of Environmental Quality (on amicus curiae) appealed the decision directly to the Louisiana Supreme Court, which in a 4 to 3 decision overruled the trial court and upheld the indictment, ruling that the language of the statute did not offend constitutional Due Process requirements. (See, Opinion of Louisiana Supreme Court, Appendix D.) Justice Knoll wrote a strong dissenting opinion, and two other justices signed that dissent. (Appendix D.) The case is now before this Court on application for writ of certiorari.

(b) FACTUAL BACKGROUND

On October 24, 1989, Marco of Iota, Inc., owner and operator of a facility for the treatment and disposal of hazardous wastes, entered into a Chapter 11 Bankruptcy Reorganization, supervised by the Bankruptcy Court in the Western District of Louisiana. In the course of that bankruptcy reorganization, Reo, Inc. (in which Petioner was an employee) entered into a contract with Marco of Iota, Inc., dated August 24, 1990, and approved by the Bankruptcy

Court on August 27, 1990, under which Marco was to receive and dispose of hazardous wastes. It was understoood at that time that Reo would provide capital allowing Marco to continue business during its bankruptcy reorganization, and that at a future date Marco would issue shares of stock to Reo in exchange for the capital investment. (The shares were never actually issued.)

During the course of bankruptcy reorganization, the question of Marco's right to receive and handle hazardous wastes was a crucial consideration. If Marco had legal authority to receive and handle the wastes, then that authorization was a valuable asset which its creditors could expect to be used profitably. If Marco did not have authorization (if it did not have "interim status") to receive and handle hazardous wastes, then Marco had no future prospect, and the court and creditors would not have authorized a reorganization. (See testimony of John Weinstein - taken at hearing on Motion to Quash, Apendix E.)

During reorganization proceedings, the Bankruptcy Court approved the appointment of an attorney specialist in the field of environmental law, and the opinion of that attorney was solicited and subsequently introduced as evidence in the reorganization proceedings. The attorney's opinion was that that Marco did enjoy "interim status" and was legally authorized to receive and handle hazardous wastes. (See, letter of Attorney Frank S. Craig III, dated August 29, 1990, Appendix F.)

Bankruptcy proceedings terminated on July 16, 1991, and Marco's Iota facility has subsequently gone out of business.

Defendant was charged with "storing" hazardous waste, without a permit, from September 1, 1990 to February 28, 1992. (A subsequent Bill of Particulars reduced the period from September 1, 1990 to February 28, 1991.) These hazardous wastes were discovered during a search of the Marco

facility in February, 1992, sometime after the business relationship between Reo, Petitioner and Marco had terminated.

In 1990, before the date of the alleged violations, the U.S. Environmental Protection Agency published new "Toxicity Characteristic Rules" (TC Rules) re-specifying the types of substances considered "hazardous wastes". Handlers of hazardous wastes were required to file new applications, listing all waste materials being handled. The new TC Rules took effect on September 25, 1990. Marco filed all necessary applications (see, Appendix E & F), and thus expanded its existing "interim status" to continue its operations. In the Affidavit of Dr. Paul Templet, past Secretary of the Louisiana Department of Environmental Quality (Appendix G), attached to Petitioner's Memorandum in Support of his Motion to Quash Indictment, Dr. Templet attests as follows:

> ...[I]nsofar as the Louisiana DEQ permitting authority was concerned at that time, if a facility with existing interim status properly notified EPA with a revised Part A Application that it was treating, storing, and/or disposing of newly regulated hazardous waste as a result of the TC Rule such that its interim status would be expanded at the federal level to include the units (tanks, drums) containing the TC waste, its interim status would likewise be expanded at the state level.

So, Marco's compliance wth EPA regulations, by filing its application, simultaneously satisfied DEQ regulations, and Marco thus expanded its interim status under both EPA and DEQ regulations. (The question of interim status is really quite involved factually, and is not the principle issue on this Writ Application; but it is important to have some familiarity with this interim status question in judging the "context", "facts" and "circumstances" surrounding enforcement of the overly vague provisions of La. R.S. 30:2183 G.(1).)

The testimony of John Weinstein, taken at the hear-

ing on the Motion to Quash, emphasizes that Marco's interim status was its only asset of substantial value during the bankruptcy proceeding — thus the question of "interim status" was an important issue before the Bankruptcy Court. (See, Testimony of Weinstein, Appendix E.) Surely, the Bankruptcy Court's attention to this matter must be Res Adjudicata, precluding the Prosecutors from now asserting that Defendants did not have interim status to handle the hazardous wastes. The Bankruptcy Court approved the contract for handling of hazardous wastes entered into between Marco and Reo.

This Court should also note that the charge against Petitioner carries a penalty of $100,000.00 *per day*, covering the period from September 1, 1990, to February 28, 1991 (a total of 181 days). thus, Petitioner faces a total potential penalty of $18.1 million(!!), plus ten years at hard labor! Petitioner will argue that the confusion and ambiguity of the stataute and charge against him is due in part to the fact that the statute broadly incorporates administsrative regulations of both the Louisiana Department of Environmental Quality and the U.S. Environmental Protection Agency - this mix of state/federal regulatory provisions and powers adds to the overall regulatory complexity, ambiguity, and uncertainty. The Court will also notice that an Attorney from the U.S. Attorney's Office acted as *lead counsel* for the State of Louisiana on appeal.(?)

ARGUMENT

(a) *SOMETHING NEEDS TO BE DONE*

The predicament in which Petitioner finds himself ensnared is the product of a growing complexity, overbreadth, and severity in state and federal environmental laws and regulations (to be found as well in other areas of complex economic activity and governmental regulation). Such statutes and regulations are becoming increasingly more complex and confusing, resorting all to frequently to expan-

sive, ambiguous "catch-all" language, incorporating overlapping federal and state administrative regulations. These catch-all regulations fail to really advise and warn citizens of exactly what actions are being proscribed, or of the severity of penalties involved. Relatively minor infractions, or knowing but guiltless actions, may carry horrendous fines and imprisonment.

Have regulators drifted into "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator"? *Albernaz vs. U.S.*, 450 U.S. 333, 343, 101 S.Ct. 1137, 1144, 67 L.Ed. 2d 275 (1981). Honestly, are citizens being provided with *adequate prior notice* of proscribed conduct?

Lower courts applying the imprecise language of some decisions of this Court have been upholding laws with broad "catch-all" references. Sec. *Davis vs. Williams*, 617 F.2d 1100 (5th Cir. 1980). In a strong *Davis* dissent, one judge has insisted that the past liberality of this Court should be limited to special facts then before the Court — referring specifically to *Arnett vs. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), and in *Parker vs. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974).

Environmental regulations have been around for some time. Up to now, courts have mentioned the need for "flexibility" and "adaptability" in the drafting and judicial interpretation of environmental regulations; this liberality was meant to allow lawmakers to police the vast, newly emerging area of environmental regulation:

> The area is in its infancy, is yet inexact, and consequently is progressively changing. Other states have taken note of the unusual nature of environmental law in considering the constitutionality of statutory prohibitions in this area....
>
> * * *

> By its very nature it defies the establishment of precise standards. It involves a highly specialized science and yet covers an exceedingly broad spectrum. It is complex and not reducible to easy equations, particularly in view of our constantly growing knowledge and understanding of our environment and its effect upon our lives and our very existence. [Citing *Southern Illinois Asphalt Co., Inc., vs. Environmental Protection Agency,* 15 ILL. App. 3d 66, 303 NE 2d 606, 611 Ill (1973)]

> Because statutes directed at the control of air pollution are intended to encompass infinitely variable environmental conditions, flexibility and adaptability are required in meeting factual situations which could not possibly be foreseen by the legislature. *State vs. Braun,* 378 A.2d 640 (Del 1977).... [I]t is sufficient if the statutes be general in nature but at the same time retain standards of sufficient clarity to put the violator on notice. ***State vs. Union Tank Car Company,* 439 So.2d 377, 382 (La. 1983)**

Well, perhaps the era of the judicial leniency, tolerating undue expansiveness, complexity, and unclarity in environmental regulations must end. Today, there is need for clarity, better order, the end of unnecessary complexities, and conflicting language; an end to regulations which fail to warn average citizens and businessmen of precisely what is proscribed; an end to monstrous potential penalties for simple, inevitable infractions.

Something must be done. Our courts can no longer "wink" at broad, vague, severly penalized environmental regulations.

Petitioner feels he has been "SNARED" in a tangle of federal/state statutes/regulations; by permits/interim permits with overlapping delays for filing; by language in a *statute* that excludes "storage" but adopts *administrative regulations*

which nevertheless include "storage", but way of a sweeping "catch-all" reference. Petitioner was acting in good faith compliance with orders of a Bankruptcy Court overseeing and approving the very operations now declared to have been criminal in nature. The question of interim status was inquired into by the Bankruptcy Court when it approved the Chapter 11 plan of reorganization; and it was understood by all that Marco had interim status. Now he finds himself indicted because environmental regulators say Marco *did not* have interim status. Who is in charge here? What is an ordinary citizen to do?

(b) *CONSTITUTIONAL DUE PROCESS – VOID-FOR-VAGUENESS DOCTRINE*

The jurisprudentially developed "void-for-vagueness" doctrine is derived from the Due Process guarantees of the Fifth and Fourteenth Amendments. A statute is void-for-vagueness if its prohibition leaves an individual without knowledge of the nature of the activity being prohibited:

> It is a prime principle of constitutional law that every statute or ordinance affecting the lives, liberties, or property of individuals in the United States must be carefully drafted so that a person of ordinary intelligence in the community can readily learn of the scope of the statute or ordinance. **Antieau and Rich, *Modern Constitutinal Law* (West 2ed 1997), §3.01, p.21.**

> The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise, to punish him for breach of that law is purposeless cruelty. **G. Williams, *Criminal Law: The General Part* (2ed 1961), p. 575.**

> The law must give fair and adequate notice of the conduct constituting an offense if punishment for the commission of that offense is to be just. A variety of rules and doctrines are designed at least in part to assure such

fair notice; the constitutionally mandated void-for-vagueness doctrine, the judicially created rule requiring strict construction of criminal statutes, the prohibition of judicialy created defenses, and the abolition of common law crimes. **Paul H. Robinson, *Criminal Law Defenses* (West, 1984), Vol. 1, §35, p. 149.**

(i) ***Vague laws ensnare the innocent***

"Vague laws may trap the innocent by not providing fair warning. "Grayned vs. City of Rockford, 4087 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed. 2d 222 (1972). This Court has pointed out that vague statutes subject citizens to the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett vs. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed. 2d 377 (1964).

(ii) ***Due Process prohibits vague laws:***

The notion that people should have notice of that which the law forbids is an imminently plausible one of ancient origin. In *Connally vs. General Construction Co.* [269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)], the Supreme Court described it as "the first essential of due process of law." ***Joseph G.Cook, Constitutional Rights of the Accused*, (3ed. 1996), Vol. 1, §1.6, pp. 1-17 through 1-18.**

A statute suffers from the vice of "overbreadth", "when a governmental limitation has not been carefully drawn and narrowly tailored to reach only the specific vice perceived". Anticau and Rich, supra, §3.02, p.23. In determining the constitutionality of a statutory provision alleged to be void for vagueness, state courts are bound by standards laid down by the United States Supreme Court.

(iii) ***Guidelines for judicial review***

To insure against the pitfalls of arbitrainess and entrapment, this Court has developed general guidelines for

review:

> Impermissably vague criminal laws have two vices. First, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." [*Grayned vs. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222 (1972).] The requirement of fair notice is essential to due process because "[n]o one may be required at peril of life, liberty or property to speculate at the meaning of penal statutes". (*Lanzetta vs. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 2d 888 (1939).] The second vice of vague penal statutes is that they delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc basis, with the attendant danger of arbitrary and discriminatory application." [Grayned, supra. 408 U.S. 104, 108-109.]
>
> It is this latter vice, the danger of discriminatory enforcement, that the Supreme court has labeled "the more important aspect of the vagueness doctrine." [*Kolender vs. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed. 2d 903 (1983).] Where the legislature fails to provide minimal guidelines to govern law enforcement officials, a criminal statute may permit a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections!" [*Smith vs. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed. 2d 605 (1974).] Such a result would confer lawmaking authority upon the executive or judicial branches, rather than the legaislative branch. **Smith and Reed, Civil Rico (Matthew-Bender) §908, p. 9-71.**

(iv) ***Strict construction of criminal statutes***

The principle that a person must have adequate notice of the meaning and the applicability of penal proscriptions is strictly applied against the state and in favor of an accused:

> It is well settled that penal statutes are subject to a strict construction. More accurately, it may be said that such laws are to be interpreted strictly against the state and liberally in favor of the accused. The rule is founded on the tenderness of the law for the rights of individuals; its object is to establish a certain rule ....73 **Am. Jur. 2d - *Statutes*, §293, pp. 451-452.**

The rule that criminal statutes are to be strictly construed against the state and in favor of the accused has been said to be a rule "perhaps not much less old than construction itself". *U.S. vs. Wiltberger*, 18 U.S. 76, 5 L.Ed. 37 (1820). "Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed." *Dunn vs. United States*, 442 U.S. 100, 99 S.Ct. 2190, 2197, 60 L.Ed. 2d 743 (1979). See also, "Rule of Lenitiy", 62 L.Ed. 2d 827.

A Louisiana Supreme Court decision in the area of environmental regulation summarizes these principles well:

> The criminal code itself requires that penal statutes must be strictly construed and can not be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime .... The rules of strict construction applicabale to the interpretation of penal statutes are also required in the interpretation of penal regulations. *United States vs. Mersky*, 361 U.S. 431, 80 S.Ct. 459, 5 L.Ed. 2d 423 (1960). ***State vs. Union Tank Car Company*, 439 So.2d 377, 385 (La. 1983)**

In our case, the trial judge cited *Union Tank Car* and declared La. R.S. 30:2183 G(1) to be unconstitutionally vague and indefinite.

(v) ***No judicial re-writing of criminal statutes***

Courts cannot rewrite or enlarge the statutory defini-

tions of crimes; and this Court has rejected the suggestion that judges develop standards for imposing criminal punishment on a case-by-case basis:

> It is one thing to recognize that some degree of uncertainty exists whenever judges are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis. *U.S. vs. Kozminski,* 487 U.S. 931, 951, 109 S.Ct. 2751, 2764, 101 L.Ed. 2d 788 (1988).
>
> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. [*United States vs. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876); Quoted in *Kolender vs. Lawson,* 416 U.S. 352, 358]. **Smith and Reed, *Civil RICO* (Mathew Bender-current through 1998), §9.08, p.9-71.**

When laws or regulations are vague, courts must not "wink" at the problem, and can not enlarge the breadth of a statute to reach allegedly criminal conduct not naturally described in the clear language of the statute. " A court can not make unconstitutional provisions constitutional by forced constructions...." 16-A Am.Jur. 2d - *Constitutional law,* §174, p.54. The judicial enlargement of criminal statutes is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness. *Pierce vs. United States,* 314 U.S. 306, 62 S.Ct. 237, 86 L.Ed. 226 (1941). A court cannot rewrite a law to conform it to constitutional requirements. *Finely vs. National Endowment for the Arts,* 100 F.3d 671 (9th Cir. 1996). "The cannon of construction that a court should strive to interpret a statute liberally in a way that will avoid an unconstitutional construction is useful in close cases. But it is not a license for the judiciary to rewrite

the language enacted by the legislature. [*Chapman vs. United States,* 500 U.S. 453, 111 S.Ct. 919, 114 L.Ed. 2d 524 (1991)]." 16-A Am.Jur. 2d - *Constitutional Law,* §173, p.53.

(vi) ***Lofty ideals are no excuse for vague criminal laws***

Nor can vague laws be upheld simply because they are intended to serve some hightly beneficial purpose:

> ...[T]he duty of the courts to give effect to the federal and state constitutions by invalidating acts in conflict with the organic law is not affected by the fact that the invalid legislation may seem highly beneficial, or by the fact that great harm or unrest may result from declaring it void. **16-A Am.Jur. 2d - *Constitutional law,* §186, p.68.**

(vii) ***Legislature cannot turn over its responsibility to other branches of government***

In areas of complex newly emerging legislation, good order and clarity in lawmaking can pose a daunting challenge. Nevertheless, a vague statute is not cured simply because the legislature chooses to delegate this difficult task to some administrative agency. There is a general rule that bars delegation of legislative authority to courts or the executive branch. This rule is subject to an exception allowing the legislature to delegate authority to an administrative agency, when the limits of that delegation are clearly defined:

> [T]he requirement that government articulate its aims with a reasonable degree of clarity insures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to thee requirements of law and permits meaningful judicial review. ***Roberts vs. U.S. Jaycees,* 468 U.S. 609, 629, 104 S.Ct. 3244, 3256, 82 L.Ed.2d 462 (1984).**

(C) *STATUTE VAGUE ON ITS FACE AND IN APPLICATION*

The Trial Judge decided that Due Process requires "definiteness". He cited the principle that penal statutes must be strictly construed and cannot be extended to include acts not within the clear import of the statutory language; nothing is aq crime which is not clearly and unmistakably made a crime. (See, Opinion of the Trial Judge, Appendix C. A-26—A-27).

The Trial Judge balked at enforcing administrative regulatory provisions read into the statute under the "catch-all" section referring to "other provisions of the Chapter", which in turn refer to expansive DEQ and EPA administrative regulations, some of which prohibit "storage":

> The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely, the "catch all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to bae unconstitutionally vague since it does not specifically state charges against these three Defendants so as to allow them to adequately prepare for a defense. **Opinion of Trial Judge, Appendix C, p. A-27.**

What we have is vagueness or lack of definiteness created by overly broad and convoluted legislative language. What is needed in this complex area of environmental regulation is good order, lack of conflicting regulations, clear, simple, concise language. These regulations should mean what they say, and say what they mean. The Louisiana Legislature has not proscribed "storage" of hazardous waste under La. R.S. 2183 G(1). "Storage" of hazardous waste is proscribed under 2183 G.(2), but only in situations where a person is handling hazardous waste "in such a manner that he knows, or should have known, at that time that he thereby places

another person in *imminent danger of death or serious bodily injury"* (emphasis added). Where no one is put in *imminent danger,* the Legislature has seen fit not to penalize "storage" - and thus did not include a proscription against storage in 2183 G.(1).

Throughout state court proceedings, the Prosecution has argued that although 2183 G.(1) does not proscribe "storage" explicitly, the prohibition can be found among administrative regulations authorized by the Legislature, referred to in "other provisions of this Chapter". La. R.S. 30:2202(B) reads as follows:

> "No person shall violate any rule or regulation adopted by the Secretarty under this Subtitle."

Now there are a number of DEQ and EPA regulations (the EPA regulations are included by reference in DEQ regulations) which do proscribe storage of hazardous waste without required permits. The question is whether or not the "catch-all reference" to other "provisions of this Chapter" and "regulations adopted by the Secretary under this Subtitle"provides sufficient notice to Petitioner that his conduct is proscribed by the statute cited in the charges against him - where the stataute itself has clearly *excluded* "storage".

The case at bar is somewhat different from most Due Process void-for-vagueness actions, in that no single word or phrase can be pointed to as being vague in itself. Instead, we are faced with the word "storage" which is clearly understood but is not included in the statute under which Petitioner is being prosecuted. Petitioner is thus being prosecuted for conduct which is *clearly excluded* from the statute cited by the Prosecution!

Early, we cited several cases showing a confused application of this Court's void-for-vagueness doctrine by lower courts trying to make sense of unfortunate "catch-all crimes". Dissenting opinions have questioned the constitutionality of "catch-all crimes". Justice Knoll's dissenting opinion in our case makes this point, when she decries the utilization of "*an*

atenuated reference to a myriad of regulations to prop up the statute in question":

> It is hornbook law that penal statutes "must be strictly construed and cannot be extended to cases not included within the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime." La. R.S. 14:3; *State vs. Union Tank Car Company.*, 439 So.2d 377, 385 (La. 1983). Likewise, a penal statute is unconstitutionally vague if it fails to notify persons of reasonable intelligence that certain, particular conduct is proscribed and legally punishable, or it fails to provide measurable standards for persons to determine guilt or innocence.
>
> * * *
>
> ...[La. R.S. 30:2183 G.(1)] does not proscribe the *storage* of hazardous waste. By utilizing an atenuated reference to a myriad of regulations to prop up the sstatute in question, the majority has expanded La. R.S. 30:2183 G.(1) beyond the provisions of the legislative enactment and has created a crime which does not exist. **Opinion by Justice Knoll, Appendix D, p. A-56**

The jurisprudence requires that when a legislature delegates authority to an administrative agency to "flesh out" statutory law through enactment of administrative regulations, then the legislature must clearly set out "boundaries" to guide the administrative agency in its task. In our case, La. R.S. 30:2183 G.(1) specifically *excludes* "storage", but the administrative regulations nevertheless proscribe it. As a general rule, the mention of one thing implies the exclusion of other things not mentioned: *expressio unis est exclusio alterius.* 73 Am. Jur. 2d - *Statutes,* §211, p. 405. The Louisiana Legislature's decision not to proscribe "storage" under 2381 G.(1), cannot be bypassed and contradicted by subsequent administrative regulations. It will not do to administratively "re-define" and make a crime. conduct inten-

tionally excluded from a statute by the Legislature. In Petitoner's supplemental brief to the Louisiana Supreme Court, the argument was stated as follows:

> The Legislature has specifically addressed the issue of storage of hazardous waste. It makes the storage of hazardous waste illegal where there is a threat of imminent bodily harm. The Legislature has also made it a crime to dispose, discharge or emit hazardous waste where there is no danger of bodily harm. The Legislature has not made it a crime to store hazardous waste where there is not threat of bodily harm. **Defendant's Supplemental Brief to the Louisiana Supreme Court, Appendix H, p. A-96**

In the face of this rule of interpretation (*expressio unis est exclusio alterius*),the Louisiana Department of Environmental Quality in an amicus curiae motion has conjured up the specter that if Louisiana courts refuse to penalize "storage", the State will lose federal funding:

> VI
>
> The federal hazardous waste control law [42 U.S.C. §§6901-6979(b)] allows states to operate their program in lieu of the federal program if the state program is equivalent, consistent, and provides for adequate enforcement....The State's comprehensive program has been authorized by the Environmental Protection Agency (EPA).
>
> VII.
>
> One of the requirements for authorization is that criminal remedies be available against any person that "treats, stores, or disposes of hazardous waste without a permit." 40 CFR 271.16(a)(3)(ii). La. R.S. 30:2183 G.(1) fulfills that requirement. If this ruling is allowed to stand, the state's authorization, and the federal funds associated with it, may be in jeopardy as we would not be providing the adequate enforcement mandated by RCRA [Resource Conservation and Recovery Act] for

authorization. **DEQ Amicus Curiae Motion Louisiana Supreme Court - Appendix I.**

So we see the Prosecution seeks to bolster shaky state law by trotting out the "loss of federal funds" argument. If there is tension between DEQ funding requirements, and Petitioner's constitutional right to be charged only under a clear and definite penal statute, then we urge this Court to uphold Due Process - if the statute is vague or conflicting, let the Legislature do its job and rewrite its law.

"Catch-all crimes" had vogue in the past where statutes proscribed "loitering"., "vagrancy", "pornography", "indecency" — there was thought to be no way to define these "crimes" with sufficient clarity and definiteness. One court decried such statutes for fostering "a dragnet approach to the maintenance of public order that had its roots in feudal England." *U.S. ex rel Newsome vs. Malcolm,* 492 F.2d 1166, 1171 (2nd Cir. 1974). Are modern environmental regulators resorting to a new version of this "dragnet approach"?

Today, legislatures and administrators may have learned to avoid puritanical proscriptions, vague words and unpopular causes. But in areas of complex regulation citizens are more and more faced with impossibly prolix, convoluted, laminated, and expansive expressions, all meant to attain "highly beneficial" goals. Then down the road, in real life, the citizen learns that he can be prosecuted for just about anything the administrator decides is "criminal". As the case law reveals, administrators can be quite arbitrary and capricious at times. The potential for abuse of power by administrators is endemic to vague, expansive, overly complex lawmaking.

Whether or not federal and state administrators are acting arbitrarily in the case at bar must be judged by the surrounding circumstances. How is it that the DEQ stood by during the bankruptcy proceedings, with full knowledge that hazardous wastes were being stored at Marco's warehouse facility in Iota, and that Petitioner and others were participating in that activity, yet DEQ did nothing to prevent

the storage? The Bankruptcy Court oversaw Marco's operations, allowing it to continue handling the hazardous wastes, accepting the opinion of Mr. Craig (the environmental law specialist) that Marco had valid interim permits and was authorized to conduct its business. But after the Bankruptcy Court terminated its Chapter 11 Reorganization, then DEQ, the U.S. Attorney's Office, and the State Attorney General slapped petitioner with an indictment for storage of hazardous waste at the Marco warehouse. Petitioner believes there has been an arbitrary and capricious abuse of authority by administrators and prosecutors.

Is it proper for prosecutors to use a state statute to penalize conduct not clearly proscribed under that statute, but proscribed under companion federal EPA regulations (as was pointed out in the DEQ's Amicus Curiae Brief)? Can states prescribe penalties for violation of federal regulations, without clearly proscribing the punished conduct under some state statute? Or is it acceptable for rulemakers to draft sloppily worded rules, and then depend on the accused, police, courts and juries to "discover" exactly what it was that the legaislature intended to criminalize? Or to resolive conflicting norms?

Throughout the state court processes, the Prosecution has taken the position that although the indictment might be unclear, the problem could be alleviated to some degree by subsequent discovery, and by the Prosecution's reponse to Petitioner's Bill of Particulars. But *post hoc* justifications will not stand:

> If, on its face, a statute is repugnant to the due process clause on account of vagueness, specifications of the details of the offense intended to be charged will not serve to validate it, since it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. **21 Am. Jur. 2d - Criminal Law, §17, p.129; citing, *Lanzetta vs. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939).**

The Louisiana courts below have cited *State vs. Dousay,* 378 So.2d 414 (1979), wherein an argument similar to the Prosecution's was rejected:

> The State also contends, in brief, that any deficiency in the definiteness of the regulation may be compensated for by the defendant's ability to seek clarification of the charges against him by availing himself of discovery devices. This argument ignores the fact that one of the regulation's fatal shortcomings is its failure to provide adequate *prior* notice of the nature of criminal conduct. **Id., p. 417.**

One commentator addresses the issue succinctly:

> A bill of particulars cannot save an invalid indictment...
>
> A prosecuting attorney may not determine what it is that the grand jury has charged. He may not, bu a bill of particulars, make a choice of one or more out of many unidentified crimes. **Mark Rhodes, *Orfield's Criminal procedure Under the Federal Rules*, (LCP, 1985), Vol. 1, §7:130, pp. 625-626.**

CONCLUSION

Petitioner was peripherally involved with a business that went sour. He became involved under the oversight of the Bankruptcy Court, and acted in compliance with the court's reorganization plan, doing what reasonable men would believe to be correct.

He has been charged with illegal "storage" of wastes under a statute which does not prohibit such storage — but the statute makes sweeping reference to extensive bodies of administrative regulations where prohibitions against storage can be found. "Storage" could easily have been listed as a proscribed act under 2183 G.(1) (it is listed in a companion paragraph), but it was not.

Petitioner was not fairly notified, in advance, of the criminal nature of the conduct for which he has been charged. The Grand Jury only cited Petitioner with violation of

2183 G.(1); Prosecutors subsequently cited numerous administrative regulations to support the deficient indictment — but all of this has been done after the fact. Due Process requires fair notice *in advance,* so that a citizen can *avoid* criminal conduct.

Uncertainties in criminal statutes are to be strictly construed in favor of those charged. Uncertainties are resolved in favor of the accused. Nothing can be read into a penal statute by implication.

The Trial Judge was close to the circumstances and held that the law was unconstitutionally overbroad and vague. Three of the seven Louisiana Supreme Court Justices believed the statute was unconstitutionally broad and vague:

> By utilizing an attenuated reference to a myriad of regulations to prop up the statute in question, the majority has expanded La. R.S. 2183 G.((1) beyond the provisions of the legislative enactment and has created a crime which does not exist. **Dissenting Opinion of Justice Knoll, Appendix D, p. A-56.**

In Justice, this Court must grant certiorari to review this matter, and then lay down new standards governing the whole phenomenon of "catch-all crimes" — judicial leniency and deference to sloppiness in the language and structure of environmental regulations must end — something must be done.

Respectfully Submitted,

SONNIER & TRAHAN

BY: _____

CHARLES R. SONNIER #12260
FRANK W. SUMMERS II #14755
SONNIER & TRAHAN
Two South Magdalen Square
P.O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR
MORRIS PELTIER, JR.

MARK R. TAMMARIELLO #21083
104 Windrush Lane
Lafayette, Louisiana 70506
(318) 261-2118
ATTORNEY FOR
MORRIS PELTIER, JR.

(2)
Supreme Court, U.S.
FILED
98 187 JUL 22 1998
OFFICE OF THE CLERK

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1998

MORRIS PELTIER, JR.
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

APPENDIX
VOLUME I App. A – D

CHARLES R. SONNIER #12260
FRANK W. SUMMERS II #14755
SONNIER & TRAHAN
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR MORRIS PELTIER, JR.

MARK R. TAMMARIELLO #21083
104 Windrush Lane
Lafayette, Louisiana 70506
(318) 261-2118
ATTORNEYS FOR MORRIS PELTIER, JR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

58 pp

TABLE OF CONTENTS

APPENDIX

(A) Indictment.....A-1

(B) Motion to Quash.....A-4

(C) Opinion of Trial Judge.....A-18

(D) Opinion of Louisiana Supreme Court.....A-30

(E) Trial Court testimony of John Weinstein, taken on hearing of Motion to Quash.....A-57

(F) Letter of Attorney, Frank S. Craig, III dated August 29, 1990.....A-80

(G) Affidavit of Dr. Paul Templet.....A-93

(H) Defendant's Supplemental Brief to the Louisiana Supreme Court.....A-96

(I) DEQ Amicus Curiae Motion filed in Louisiana Supreme Court.....A-101

(J) Bill of Particulars.....A-106

(K) Proof of EPA Application (Interim Status Automatic).....A-112

APPENDIX A

STATE OF LOUISIANA,

PARISH OF ACADIA.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF LOUISIANA:

The Grand Jurors of the State of Louisiana, duly empaneled, sworn and charged to enquire within and for the Parish of Acadia State aforesaid, upon their oath do present THAT _____ at the Parish of Acadia, on or about the 1st day of September in the year of our Lord, One Thou-_____ sand Nine Hundred and Ninety through on or about the 27th day of February, in the year of our Lord One Thousand Nine Hundred and Ninety-two:

COUNT ONE

GEORGE S. YASMINE, BILLY R. CRAWFORD and TIMOTHY J. KERN knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisiana Highway 370 in Acadia Parish in such a manner that they knew or should have known that they thereby placed another person in imminent danger of death or serious bodily injury without a permit or interim status for such storage, in violation of the provisions of La. R. S. 30:2183 (G) (2);

COUNT TWO

PETER F. NICOLOSI, MORRIS PELTIER, JR. and TIMOTHY G. BYRD, SR. knowingly stored hazardous wastes at the Marco of Iota, Inc. facility on Louisiana Highway 370 in Acadia Parish without a permit or interim status for such storage, in violation of the provisions of La. R. S. 30:2183 (G) (1):

contary to the form of the Statute of the State of Louisiana, in such cases made and provided and against the peace and dignity of the same.

/s/ M. Patricia Jones

ASSISTANT ATTORNEY GENERAL

A-3

No. 49 321

STATE OF LOUISIANA

vs.

GEORGE S. YASMINE, BILLY R. CRAWFORD, TIMOTHY J. KERN, PETER F. NICOLOSI, MORRIS PELTIER, JR. and TIMOTHY G. BYRD, SR.

INDICTMENT

Charge:

Count One: Illegal Storage of Hazardous Waste With Knowing Endangerment La. R.S. 30:2183 (G) (2)

Count Two: Illegal Storage of Hazardous Waste La. R.S. 30:2183 (G) (1)

A True Bill

/s/ Joseph L. LeJeune

Foreman of the Grand Jury

Filed August 5, 1994

Karen Perry

Deputy Clerk of Court

APPENDIX B

STATE OF LOUISIANA	**: 16TH JUDICIAL DISTRICT COURT**
VERSUS	**: DOCKET NO. CR 49321 D**
MORRIS PELTIER	**: ACADIA PARISH, LOUISIANA**

***

2.

LaRS 30:2183(G)(1) addresses "any person who willfully or knowingly discharges, emits, or disposes of any substance . . ." The statute specifically does not prohibit storage. In LaRS 30:2173 storage is defined as the "containment of hazardous waste on a temporary basis, for such time as may be permitted by regulations, in such a manner as *not* to constitute disposal of such hazardous waste."

3.

Disposal is defined as the discharge, deposit, injection, dumping, spilling, leaking or placing of any hazardous waste into or on land or water so that such waste, or any constituent thereof, may enter the environment or be emitted into the air or discharged into any waters, including ground waters." Therefore, storage and disposal are mutually exclusive terms.

4.

As the indictment charges storage of hazardous waste, which is not a crime, and the hazardous waste control law contains mutually exclusive definitions for storage and disposal, Morris Peltier cannot be charged with a crime of illegal storage of hazardous waste.

5.

The indictment also charges that Morris Peltier stored hazardous waste without a permit *or* interim status. Under LaCRP Art. 480, it is illegal to charge a crime in an indict-

ment using the disjunctive. As such, the indictment is unconstitutional in that it is duplicitous and fails to sufficiently notify Morris Peltier of the offense charged.

6.

The State has limited the time frame in which Mr. Peltier allegedly committed the charged crime via it's answer to our Bill of Particulars to September 1, 1990 through February 28, 1991.

7.

From September 1990, through February 1991, REO International Corporation, a corporation organized under the laws of the State of Louisiana, was involved in proceedings before the U.S. Bankrupcy Court for the Western District of Louisiana in an effort to provide the financial assistance necessary to assist Marco of Iota, Inc. out of its Chapter 11 bankruptcy proceedings.

8.

On August 24, 1990 a contract to perform "procuring, handling, processing, distributing and blending services" was entered into between Marco of Iota, Inc. and REO International Corporation. That contract, which was filed with the U.S. Bankruptcy Court, was approved by the U.S. Bankruptcy Court on August 27, 1990. (See Exhibit C).

9.

The contract clearly indicates the owner/operator of the

facility is Marco of Iota, Inc. Indeed, in the confirmed plan of reorganization attached hereto as Exhibit D, it is clear the owner/operator of the Marco facility is Marco of Iota, Inc. Under existing regulations found ot LAC 33:V.303(E)(1) it is the owner and operator of the facility who must obtain permits. Therefore, Morris Peltier could not have violated a permit since REO was neither an owner or operator of the facility. However, given the disjunctive nature of the indictment, interim status and the Revised Permit "A" application should be addressed.

10.

On March 29, 1990 the Federal Environmental Protection Agency (EPA) published the "Toxicity Characteristic Rule" or "TC Rule", which expanded the definition of hazardous waste. The TC Rule brought many petroleum based wastes that had not been considered hazardous waste into the hazardous waste system. The rule took effect on September 25, 1990.

11.

The preamble to the TC Rule states:

> If these wastes [newly regulated in the TC Rule] are in a previously unregulated unit, *they will be subject to the self-implementing Federal Standards* for Hazardous Waste Management at 40 CFR 265 until permit issuance (for interim status facilities) for modification for permit facility.

(See SS Fed. Reg. 11848 Attached as Exhibit E).

12.

The EPA preamble also provided instruction to the permittee in the situation in which the state was not authorized to implement the rule:

> Because EPA must implement this rule until the state is authorized to do so, the permittee must comply with federal permit modification procedures under 40 CFR 270.42 *rather than* state permit modification procedures.

(See 55 Fed. Reg. 11848 attached as Exhibit E).

13

The notification requirements under the EPA interim statue rule found at 40 CFR 270.72(a)(1) provide:

> (a) Except as provided in paragraph (b), the owner or operator of an interim status facility may make the following changes at the facility:
>
> (1) Treatment, *storage*, or disposal of new hazardous wastes not previously identified in Part A of the permit application (and, in the case of newly listed or indentified waste, addition of the units being used to treat, store, or dispose of the hazardous waste on the effective date of the listing or identification) *if the owner or operator submits a revised Part A permit application* prior to such treatment, storage, or disposal; (See Exhibit F).

14.

On September 24, 1990 Marco sent to *EPA* a revised

part "A" Interim Status Application providing that Marco was claiming interim status for handling additional hazardous wastes due to the TC Rule as well as drum storage of these newly regulated hazardous wastes. *A copy was also provided to DEO.* (See Revised Part 1, Subsection "A", Interim Status Application attached as Exhibit G).

15.

Therefore, Marco, who was the owner/operator of the facility, and who was subject to the continuing scrutiny of the U.S. Bankruptcy Court where the LDEQ was represented through its counsel, complied with the existing federal law when it submitted its application in September, 1990. Further, although DEQ did not adopt the state version of the TC Rule until April 20, 1991, Marco's notification to DEQ regarding its additional hazardous wastes and subsequent drum storage of those hazardous wastes pursuant to the EPA TC Rule, also satisified the state requirement for such changes even though the State was not clear what the requirements were.

16.

On September 14, 1990, the Louisiana DEQ, through its counsel of record, filed into the bankruptcy record an official objection to the August 24, 1990 contract due to a need to make a "determination as to the department's jurisdiciton." (See Exhibit H).

17.

On December 6, 1990, the DEQ, through its counsel, entered into a joint stipulation, also approved by the Bankruptcy Court, whereby "all materials delivered under

the contract between REO and Marco will be delivered, placed, managed, blended and/or processed only at the Iota facility and only in Tnak S-5 provided that, as represented by Marco, the processing and management of the materials made the subject of this contract, as well as all other materials, is in accordance with all applicable requirements under the Louisiana Hazardous Waste regulations, *pending determination of interim status under the DEQ regulation for tanks other than the S-5 tank. Once the status of the other tanks is determined by the DEQ, then the DEQ may give approval for Marco's use of other tanks for processing and storage."* (Emphasis added). (See Exhibit I).

18.

Thus, as late as December 6, 1990, the LDEQ, through its counsel of record in proceedings before the U.S. Bankruptcy Court for the Western District of Louisiana, not only had uncertainty as to its own jurisdiction, but as to the interim status of the facility itself. The fact is interim status did exist under state law as well.

19.

One of the regulations in effect in 1990, LAC 33:V.4303(a)(1), which included requirements for interim status facilities, provided for any changes occurring at the permitted facility and required notification of any such change (just as the federal regulation), as follows:

> 4303. Changes during interim status.
>
> (A) Except as provided in LAC 33 V.4303(b), the owner or operator of an interim status facility may make the following changes at the facility:

(1) Treatment, storage, *or disposal of new* hazardous waste not previously identified in Part 1 of the permit application (and, in the case of newly listed or identified waste, addition of the units being used to treat, store, or dispose of the hazardous waste on the effective date of the listing or identification) if the owner or operator submits a revised Part I permit application prior to such treatment, *storage,* or disposal.

(See Exhibit J).

20.

Thus, during the time frame from September 1, 1990, through February 28, 1991 and even though DEQ did *not* have permitting authority, not only could Morris Peltier *not have been a permit holder,* even if he were a permit holder, interim status for storage was obtained by virtue of the Revised Part A application submitted to the federal government.

21.

Obviously, the State must now disagree with this interpretation, but the fact remains their experts and lawyers were not sure in December of 1990 if they did or did not have interim status! If the existing regulations, when subjected to legal scrutiny, can result in differing beliefs by the experts and lawyers whether the facility had interim statuts under administrative regulations, the U.S. Supreme Court has stated that administrative regulations accompanied by criminal sanctions should not leave a businessman, such as Morris Peltier, "left to guess the meaning of regulations." *U.S. v. Mersky,* 361 U.S. 431 (1960).

WHEREFORE, Morris Peltier prays that Count 2 of the indictment against him be quashed.

Respectfully submitted,

/s/ Morris Peltier

MORRIS PELTIER
920 WEST PINHOOK RD.
SUITE 328
LAFAYETTE, LA 70503
(318) 269-1451

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to U.S. Attorney, Patricia Jones by placing same in the United States mail, postage prepaid and properly addressed.

Lafayette, Louisiana on this 31st day of May, 1996.

/s/ Morris Peltier

Filed 5-31- 1996
/s/ Illegible
DV. CLERK OF COURT
ACADIA PARISH, LA.

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

In re:

Marco of Iota, Inc. Case No. 89-50937-LO-11

Debtor Chapter 11

EX PARTE MOTION AND ORDER FOR AUTHORITY TO ENTER INTO CONTRACT TO PERFORM BLENDING SERVICES

NOW INTO COURT, through undersigned counsel, comes MARCO OF IOTA, INC., debtor in possession, who, with respect represents as follows:

1)

Debtor in possession is in the business of refining and/or blending petroleum products at both its plant installations in Iota and Crowley, Louisiana.

2)

Debtor in possession has received an offer to enter into a contract to perform blending services with REO INTERNATIONAL, CORPORATION under the terms and conditions as set out in said contract, a copy of which is attached hereto and made a part hereof as Exhibit "1".

3)

Debtor in posssession asserts that this contract would be mutually beneficial to **MARCO and REO** and as such beneficial to all creditors of the estate and in the best interest of the estate herein.

4)

Debtor asserts that said contract is not outside the normal business operations of **MARCO OF IOTA, INC.** and that debtor in possession is fully capable of performing its obligations under the proposed contract immediately.

5)

Debtor in possession asserts that there is insufficient time within which to notice all creditors of the estate due to the fact that the products to be blended are ready for immediate blending and that further delays in the execution of this contract may result in price changes in the petroleum market such that this contract would no longer be economically advantageous to the debtor herein.

WHEREFORE, debtor in possession prays that this Honorable Court authorize an ex parte order permitting **MARCO OF IOTA, INC.** to enter into a contract to perform blending services with **REO INTERNATIONAL, CORPORATION** under the terms and conditions that are set forth in the attached copy of said contract.

Respectfully submitted,

JOHN HAAS WEINSTEIN, APLC

BY: /s/ Patrick J. Mangan

PATRICK J. MANGAN
P.O. BOX 8
(318) 948-4700
ATTORNEYS FOR
MARCO OF IOTA, INC.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA

FILED
AUG 27 1990

In re:

Marco of Iota, Inc.	Case No. 89-50937-LO-11
Debtor	Chapter 11

****

EX PARTE ORDER AUTHORIZING DEBTOR TO ENTER INTO CONTRACT TO PERFORM BLENDING SERVICES

The Court considering the Ex Parte Motion of Debtor in Possession to enter into a contract to perform blending services, filed herein, and the Court being of the opinion that same would be in the best interest of the estate and not prejudicial to any creditor herein:

IT IS ORDERED, that **MARCO OF IOTA, INC.** be and is hereby authorized to enter into that certain contract to perform blending services with **REO INTERNATIONAL, CORPORATION,** under the terms and conditions outlined in said contract, a copy of which is attached and made part of debtor's original motion herein.*

---

* Further Ordered that debtor's counsel notice this Order by September 1, 1990, with such notice to advise that any party objecting to the continuation of performance under the contract shall file a written objection

OPELOUSAS, LOUISIANA this 27 day of August, 1990.

/s/ Louis M Phillips

Louis M. Phillips
U.S. BANKRUPTCY JUDGE

---

footnote * continued

by September 14, 1990 and notice with objection at 9:15a.m.

bankruptcy record in certified form — there are a lot of documents in it.

MS. JONES: No objection, Your Honor.

THE COURT: Let it be made part of the record.

[EXHIBIT D-1 IN GLOBO INTRODUCED]

MR. BURNS: Your Honor, I have just a few questions of this witness.

THE COURT: All right, go ahead.

DIRECT EXAMINATION

BY MR. BURNS:

Q. Mr. Weinstein, isn't it a fact that subsequent to the plan of reorganization this bankruptcy was indeed reopened in 1992 and 1993?

A. You would have to show me some documents to refresh my memory. I may have been, but I just can't recall.

Q. In fact — well, I'll ask you if you remember. Do you remember, in fact, doing a letter and a motion to reopen this bankruptcy filed by Mr. Kern and REO because of misrepresentation in the plan?

A. If you could show me those documents —

Q. I don't have the documents with me.

A. I don't recall. That may have occurred but, once again, this is not the only case that I filed.

Q. I understand.

MR. BURNS: Thank you, Your Honor.

[The Witness Was Excused]

MR. HANNA: Judge, I would not call the last witness if the Court will permit me about two minutes of argument on the issue of the regulation.

THE COURT: No, I don't want to hear that right now.

MR. HANNA: All right. Then I have no further witnesses, Judge.

THE COURT: Then let me proceed with what I have to say about this.

BY THE COURT:

We have in this case motions to quash the indictment by Peter Nicolosi, Timothy G. Byrd, Morris Peltier, Timothy J. Kern, and Mr. George Yasmine. We also have motions by Nicolosi, Byrd & Peltier to reconsider this evidence, and we have motions for additional discovery by Nicolosi, Byrd & Peltier.

The defendants Nicolosi, Byrd and Peltier are charged

with the storage of hazardous waste without a permit or interim status, in violation of LA. R.S. 30:2183(G) (1). Defendants Timothy J. Kern and George Yasmine are charged with storage of hazardous waste with knowledge of placing others in imminent danger or serious bodily injury without a permit or interim status, in violation of LA. R.S. 30:2183 (G) (2). So I may be referring to G1 and G2.

All the defendants have moved to quash the indictment, and all of the defendants argue the indictment charges them in an impermissible disjunctive manner by using the word "or", in contravention of Louisiana Code of Criminal Procedure Article 480. Article 480 prohibits charging crimes in the alternative when the crime is one that can be committed in a number of ways. The Court agrees with the State's assertion that the alleged crimes are not charged alternatively because the crime can only be committed in one way: To store hazardous waste without a permit and without an interim status permit. This is not a crime that can be committed in a number of ways. So Article 480's prohibition does not require quashing the indictment, and the Court will so rule.

Now Defendants Kern and Yasmine have adopted the arguments where the facts apply to them as given by Nicolosi, Byrd and Peltier. Now since Defendants Kern and Yasmine have been charged with violating G-2, as I will refer to it, and not G-1, the Court finds only the issue of the impermissible use of the disjunctive "or" which is present in both statutes to be applicable to the Defendants Kern and Yasmine, and I will at this time consider oral argument on that point as to those two.

MS. JONES: Your Honor, I think I may have lost you. That would be on the disjunctive —

THE COURT: Yes, the disjunctive. That's all we're talking about.

MS. JONES: — with regard to Kern and Yasmine under G-2?

THE COURT: Right. All right, let's let Mr. Burns argue that point. Will your argument cover both clients or not?

MR. LOPEZ: I would think so, Your Honor, but I —

THE COURT: If it's deficient, Ed, you can say something additional. All right?

BY MR. BURNS:

Your Honor, I would submit that we have adequately briefed it, so I will be very brief.

Count 1 of the indictment says that Timothy J. Kern and George Yasmine knowingly stored hazardous waste at the Marco of Iota, Inc. facility in a manner where they knew or should have known. . . that placed another person in imminent danger of death or serious bodily injury, and without a permit or interim status.

I think that these are disjunctive, that the Supreme Court decision concerning disjunctive are applicable, and that Count 1 should be quashed as to these two defendants.

MR. LOPEZ: We would adopt that argument, Your Honor.

THE COURT: All right, Ms. Jones?

BY MS. JONES:

Thank you, Your Honor. With regard to the defendants' argument that the charge is disjunctive because it says "without interim status or a permit," the State will make the same argument we made in the memorandum regarding G-1, which is this crime can be only committed in one way as far as that is concerned. There has to be no permit and no interim status in order for there to be a crime.

With regard to the mental state required for "knew or should have known" and the "imminent danger" posed of "great bodily injury" or "death," I submit that perhaps I should have charged it with an "and," and that Article 480 perhaps does apply to those aspects of the indictment. However, Your Honor, I did not put this in the memorandum could I didn't think it was necessary. Those issues were only raised in the memorandum filed recently, that Article 480 does not in fact require conjunctive charges, it permits conjunctive charges. And Article 5 of the Code of Criminal Procedure in fact says that the word "may" is to be construed as permissive. And if Your Honor would look at Article 480, it says that "If the offense may be committed in more than one way, it may be charged conjunctively or set forth conjunctively in a Bill of Particulars.

In this case the defendants had not even asked for a Bill of Particulars to clear up any confusion that exists about

whether they're charged with both of these states of mind and both of the imminent dangers to death and to great bodily harm. If they file a Bill of Particulars I will answer with an "and," and that will solve everything, and that satisfies Article 480.

Additionally, as I mentioned earlier, I don't think Article 480 prohibits disjunctive charges because it doesn't use the words "shall be charged conjunctively." It only says "may be charged conjunctively."

And the cases which the defendant cites are prior to the enactment of Article 480. They are in the prior article under the prior code, and I'm not sure what language it used because I wasn't able to get a copy of the old article before today. So I don't think the cases can apply unless the defendants can specify what the wording of those cases is.

Additionally, Your Honor, I would make the same argument I made with regard to the G-1 defendant, which is if there is an error, if the Court finds a defect, it's a formal defect and the indictment can be amended pursuant to Article 532 Subsection 2 and Article 487 of the Code of Criminal Procedure. The Code specifically provides that if there is a formal defect in violation of those chapters of the Code, that the Court can permit an indictment. And I will be glad to amend the indictment to put an "and" at both of those places in the indictment. And I think that would satisfy everything, even if there is a defect.

Or, Your Honor, if the defendants file a motion for a Bill of Particulars, I will answer it.

BY MR. BURNS:

Your Honor, briefly, Article 480 — she is correct — says "may charge conjunctively." That's not our argument. They did charge disjunctively, and that's what's improper. And it was presented to the grand jury, and the grand jury — we do not know how they based their opinion for probable cause.

I submit to the Court that the State is correct, that the proper remedy is either to file a new Bill of Information or a new indictment.

THE COURT: Well, I disagree, and I'm going to overrule your objection on that point.

BY THE COURT:

Defendants Nicolosi, Byrd & Peltier further argue that the storage of hazardous waste does not constitute a violation of G-1 because the statute only prohibits unpermitted discharge, emission or disposal of hazardous waste. Finally, they argue that G-1 is unconstitutionally vague because the statute does not set forth specifically proscribed acts so as to put the defendants on notice as to what constitutes a criminal act, and hence, to prepare a defense thereto.

As to the Defendants Nicolosi, Peltier and Byrd's assertions that the statute is invalid and unconstitutionally vague, the State acknowledges that "storage" is not a specifically proscribed act under G-1. The State argues that the defendants are really charged with violating the section of 2183 (G) (1) which prohibits any person from knowingly violating

any provision of Chapter 30, the Louisiana Hazardous Waste Control Law which is referred to as "LHWCL."

In LA. R.S. 30:2202 (B) the LHWCL prohibits the violations of the regulations promulgated by the Louisiana Department of Environmental Quality. The Louisiana DEQ regulations are promulgated in the Louisiana Administrative Code referred to as "LAC."

Under LAC 33:105 (F) and 33:V.303B, it is impermissible to store hazardous waste without a permit or interim status permit. Therefore, the State contends it can validly charge these three defendants with violating LA. R.S. G-1 for storage of hazardous waste without a permit or interim status permit.

Under LA. C.Cr.P. Art 464, an indictment must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated.

In *State v. Union Tank Car Company,* 439 So.2d 377, our Supreme Court addressed the constitutional requirements of definiteness as follows:

> "The constitutional requirement of definiteness derives from the due process clauses of the United States and Louisiana Constitutions, and from Article 1 Section 13 and 16 of the 1974 Louisiana Constitution. Under these provisions, in order to pass constitutional muster, a criminal statute must meet two requirements. First, it must give adequate notice to individuals that certain

contemplated conduct is proscribed punishable by law. Secondly, it must provide adequate standards for those charged with determining the guilt or innocence of an accused.

In connection with the requirement of adequate notice, this court has held that a penal statute must describe unlawful conduct with sufficient particularity and clarity that ordinary men of reasonable intelligence are capable of discerning its meaning in confirming their conduct thereof. Likewise, the requirement of adequate standards for ascertaining guilt mandates that a criminal statute mark boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will.

The criminal code itself requires that penal statutes must be strictly construed and cannot be extended to cases not included with the clear import of their language, and that nothing is a crime which is not clearly and unmistakably made a crime. The rules of strict construction applicable to the interpretation of penal statutes are also required in the interpretation of penal regulations."

In *State V. Dousay,* 378 So.2d 414, the Court further stated:

"The constitutional requirement of definiteness is satisfied when the language of a criminal enactment has a generally accepted meaning, such that a person of ordinary intelligence would be given fair notice of what conduct is forbidden, or when the crucial words

or phrases in the criminal statute have a fixed and definite meaning for the person of ordinary intelligence.

When, as here, administrative regulations are accompanied by criminal sanctions, the United States Supreme Court has stated that businessmen must not be left to guess the meaning of regulations."

The Court finds that there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the Court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwise knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense.

For these reasons, the Court hereby grants the motions to quash by Defendants Nicolosi, Byrd & Peltier. Defendants Kern and Yasmine's motion to quash is denied, as the Court finds no merit in their arguments since they were charged under another statute; namely G-2, and the arguments rendering G-1 unconstitutionally vague do not apply, in the Court's opinion, to G-2.

As a result of this ruling, the motions to reconsider severance and for additional discovery by Defendants Nicolosi, Byrd & Peltier are rendered moot by the Court's ruling.

MS. JONES: Your Honor, the State would notice

its intention to appeal or take writs from the Court's ruling.

THE COURT: All right, we will note it for the record.

MR. BURNS: Your Honor, on behalf of Mr. Kern we would state the same objection to the court's ruling.

THE COURT: We will note that for the record, also.

MR. LOPEZ: And as to Mr. Yasmine, also, Your Honor.

[THE PROCEEDING WAS CONCLUDED]

CERTIFICATE OF COURT REPORTER

I, MARILYN RICHARDSON, C.S.R., do hereby certify that I am a duly appointed, qualified, and acting official court reporter for the 15th Judicial District Court in and for the Parishes of Acadia, Lafayette, and Vermilion, the state of Louisiana.

I further certify that the foregoing *53* pages is a true and correct transcript of the proceedings held in the captioned cause and that said transcript is a true and correct transcription of my stenographic notes then and there taken.

Lafayette, Louisiana, this *22nd* day of *July*, 1996.

/s/ Marilyn Richardson
MARILYN RICHARDSON, C.S.R.
Official Court Reporter, Div. J
Certification #87001

Filed: *Aug. 19, 1996*
s/ Paula M. Stafford

A TRUE COPY OF THE ORIGINAL

/s/ Gretchen S. Bertrand
DEPUTY CLERK OF COURT
ACADIA PARISH, LA.

APPENDIX D

SUPREME COURT OF LOUISIANA

No. 96-KA-2302

MAR 13 1998

STATE OF LOUISIANA

Versus

TIMOTHY G. BYRD, SR., MORRIS PELTIER AND PETER F. NIGOLOSI

ON APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF ACADIA, HONORABLE DON AARON, JR., JUDGE

JOHNSON, Justice*

In this case, we must decide whether the trial court erred in holding a state statute unconstitutional on the basis of vagueness. The defendants were indicted for violating La. R.S. 30:2183(G)(1) by knowingly storing hazardous waste at their Marco of Iota, Inc. facility located on Louisiana Highway 370 in Acadia Parish. Following a hearing on defendants' motion, the trial judge quashed the indictment, finding that the "catch-all" provision contained within the statute was so overbroad, it was rendered unconstitutionally vague.

---

* Victory, J., not on panel. See Rule IV, Part 2 § 3.

Pursuant to La. Const. art. V, § 5 (D), the State filed a direct appeal to this court. Although language contained within the "catch-all" provision of La. R.S. 30:2183(G))1) is somewhat expansive because it refers the reader to the entire Chapter on Hazardous Waste Control, we find that the trial court erred in holding the statute unconstitutional. Additionally, we find that the statute does not constitute an unauthorized delegation of legislative authority.

FACTS AND PROCEDURAL HISTORY

Pursuant to an indictment issued by an Acadia Parish Grand Jury, the defendants, Peter F. Nicolsi, Morris Peltier, Jr. and Timothy G. Byrd, Sr. were charged with violating La. R.S. 30:2183(G)(1).[1] The indictment charged that each of these defendants knowingly stored hazardous waste at their facility located in Acadia Parish, without a permit or interim status for such storage. The indictment further charged George S. Yasmine, Billy R. Crawford and Timothy J. Kern with violating La. R.S. 30:2183(G)(2) for knowingly storing hazardous waste at the same facility.[2]

The defendants assert that their involvement in Marco stems from Marco's filing for bankruptcy. On October 24, 1989, Marco, a Louisiana corporation, filed for protection

---

[1] These charges composed count two of the indictment which was filed on August 5, 1994.

[2] Count one of the indictment charged Yasmine, Crawford and Kern with knowingly storing hazardous waste at the Marco of Iota, Inc., facility in such a manner that they knew or should have known that they thereby placed another person in imminent danger of death or serious bodily injury without a permit or interim status for such storage.

under Chapter 11 of the U.S. Bankruptcy Code. The defendants assert that because Marco was a hazardous waste storage facility, the bankruptcy was "heavily litigated," and the bankruptcy court was "much more strict" and required "much more detail than what ordinarily goes into a plan of reorganization."[3] John Weinstein, an attorney who testified at the motion to quash haring, characterized Marco as "a fuel-blending partially hazardous waste storage facility."[4]

In September of 1990, defendant Peter F. Nicolosi became president of a company known as Reo International. Defendant Timothy Byrd was the secretary-treasurer, and defendant Morris Peltier was employed as a consultant. Reo was a separate corporation whose role in the bankruptcy was to recapitalize marco so that it could satisfy its creditors. After confirmation of the reorganization plan, Marco was to reissue its stock to Reo in consideration for the recapitalization.

Each of the three defendants in May of 1996 filed a motion to quash allegaing the following: 1) the indictment failed to charge an offense which is punishable under a valid statute; 2) the indictment contains an improper misjoinder of offenses[5] and 3) R.S. 30:2183(G((1) is unconstitutionally vague. Specifically, defendants argued that there was no crime for "storage" of hazardous waste within R.S. 30:2183(G)(1) and that the attempt to utilize the body of hazardous waste regulations as the basis of the charge against

---

[3] Weinstein represented Marco, the debtor, in their bankruptcy case filed in the United States Bankruptcy Court, Western District of Louisiana.

[4] The Louisiana Department of Environmental Quality was a creditor of Marco and was represented at most of the hearings.

[5] The trial court rejected this argument and neither party raises it on appeal.

them failed to give adequate notice and provide adequate standards. Defendants contend that by virtue of the state's first response to their motion for a bill of particulars, (i.e., "See indictment") the state was effectively charging them with violating the entire body of hazardous waste regulations (via R.S. 30:2183(G((1) and 30:2202(B))[6] Defendants further contend that at the time of the alleged conduct, the Marco facility was in full compliance with the Louisiana Hazardous Waste Control Law (HWCL) and the hazardous waste regulations and that Reo did not own or operate the Marco facility at that time.

On July, 10, 1996, the trial court conducted a hearing which encompassed defendants' motions to quash.[7] At the conclusion of the hearing, the lower court opined that the indictment lacked definiteness as to what activity was prohibited by the statute at the time of the alleged violations. After hearing testimony from Weinstein regarding the bankruptcy case, the trial court quashed the indictment.[8]

---

[6] Secondarily, defendants also note that some of the regulations cited by the state in their amended and supplemental answer to defendants' motion for bill of particulars were not in effect at the time of the alleged conduct. This argument, however, was not raised in defendants' motion to quash nor was it raised at the hearing and consequently was not a basis for the trial court's decision.

[7] There were several motions set for consideration, including motions for additional discovery, and motions to reconsider severance. Also, Yasmine, Crawford and Kern filed motions to quash the charges outlined in count one of the indictment.

[8] Weinstein testified that he represented Marco in their bankruptcy proceeding. He went on to testify that the issue of whether Marco was properly permitted was litigated during the bankruptcy proceedings. The defense attrorney went on to question Weinstein about Reo's role in the bankruptcy proceeding as well as marco's compliance with the hazaardous waste regulations. Weinstein responded that his specialty was

In quashing the indictment, the district court found:

> "there is a lack of definiteness as to what the state of the law was at the time of the alleged criminal activity. Furthermore, the court finds that the section of the statute relied on by the State, namely the "catch-all" section prohibiting any person who otherwises knowingly violates any provision of the Chapter to be subject to criminal sanctions, to be so overbroad as to be unconstitutionally vague since it does not specifically state charges against these three defendants so as to allow them to adequately prepare for a defense."

The trial court based its ruling upon two cases dealing with constitutional vagueness, *State v. Union Tank Car Co.*, 439 So.2d 3k77 (La. 1983) and *State v. Dousay,* 378 So. 2d 414 (La. 1979). The trial court determined that there was no basis to quash count one of the indictment. However, the motions to quash count two filed on behalf of Nicolsi, Peltier and Byrd were granted. This opinion only involves the violations listed in count two.

The parties presented their arguments before this court on October 20, 1997, at which time the defendants alleged that the crime with which they were charged was created by a state agency and constitutes an improper delegation of legislative authority. At the conclusion of oral argument, the parties were instructed to file supplemental briefs on this issue.

---

footnote 8 continued

bankruptcy and not environmental compliance and consequently, he could not state whether Maraco was in compliance with the hazardous waste regulations.

DISCUSSION

Delegation of Legislative Authority

Under proper circumstances, our case law allows the delegation of legislative authority to executive agencies. In *Schwegmann Brothers Giant Super Mkts. v. McCory,* 237 La. 768, 112 So.2d 606 (La. 1959), this court concluded that our Legislature may confer authority on administrative boards and commissions to determine the facts or state the things upon which the law intends to make its action depend. There, we found:

> "It is now well settled that the Legislature may make the operation or the application of a statute contingent upon the existence of certain conditions, and may delegate to some executive or administrative board the power to determine the existence of facts and to carry out the terms of the statute. So long as the regulation or action of the official or board authorized by statute does not in effect determine what the law shall be, or involve the exercise of primary and independent discretion, but only determines within the prescribed limits some fact upon which the law by its own terms operates, such regulation is administrative and not legislative in its nature."

Schwegmann, 112 So.2d at 613; *State v. All Pro Paint & Body Shop, Inc.* 93-1316 (La. 7/5/94); 639 So. 2d 707.

While an administrative agency can conduct ministerial or administrative duties, to determine whether a statute unconsitutionally delegates legislative authority to such agency our jurisprudence employs a three-prong analysis which is